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Before the  
Federal Communications Commission  
Washington, D.C. 20554

MM Docket No. 94-20

In re Application of

FAMILY File No. BPH-910924MB  
BROADCASTING, INC.

For Construction Permit for a  
New FM Station, Channel 229A  
Hague, New York

**Appearances**

Joseph E. Dunne, III, Esq. on behalf of Family Broadcasting, Inc., and Norman Goldstein, Esq., and Robert A. Zauner, Esq. on behalf of the Mass Media Bureau.

**DECISION**

Adopted: March 5, 1996;

Released: March 14, 1996

By the Review Board: MARINO (Chairman), and  
GREENE.

Board Chairman MARINO:

1. Family Broadcasting, Inc. filed exceptions to an *Initial Decision (I.D.)* by Administrative Law Judge John M. Frysiak (ALJ), 10 FCC Rcd 3174 (1995), contending that the ALJ erred both in determining that Family did not have reasonable assurance of its initially specified antenna site and in rejecting its subsequent site amendment. It charges that, in rejecting the amendment, the ALJ ignored his own findings that Family had specified the initial site with innocent intent. The Mass Media Bureau replied that Family did not obtain reasonable assurance of the availability of the site at the time it filed its application, and that, under controlling Commission precedent, it may not later amend that application to specify a new site. Oral argument was not requested. We affirm the ALJ's decisional findings and conclusions, which are supported by the record and the precedent discussed below.

**BACKGROUND**

2. Family filed its application to establish a new FM station in Hague, New York, on September 24, 1991. The Commission designated the application for hearing based on an informal objection that raised a substantial and material question of fact "as to whether Family had reasonable assurance of its specified site at the time of certification." *Hearing Designation Order (HDO)*, 9 FCC Rcd 1564, 1565 ¶ 9 (MMB 1994).

3. Briefly summarized, the pre-designation pleadings reflected that Family certified in its application that it had reasonable assurance that the summit of Mount Defiance was available for use as its antenna site and that it had

obtained such assurance from Nick Westbrook, who was identified as the site owner's agent. *HDO* at ¶ 5. Westbrook, however, by letter, dated January 23, 1992, informed the Commission that the site owner had "no intention of leasing tower access" to Family and that "there was no basis whatsoever" for Family's representation of reasonable assurance. *Id.* at ¶ 6. Attached to the correspondence was an earlier letter from Westbrook to Alexander McEwing, Family's President, dated November 14, 1991, referencing a telephone conversation on September 18, 1991 "about lease possibilities," but declaring that he, Westbrook, had "stated clearly that we would consider written proposals only, detailing technical and financial implications." *Id.* at ¶ 5.

4. In response to a subsequent Commission inquiry, McEwing acknowledged that during the telephone conversation, Westbrook had initially requested a formal proposal including Family's tax status, the proposed rent, the time frame within which Family anticipated that the station would be built, and the amount of electricity the station would use. *Id.* at ¶ 6. McEwing purportedly explained to Westbrook that the application process was time consuming, and it would be 18 to 36 months before the site was needed; that Family was "under some time constraints to get the application on file"; and that the Commission only required "reasonable assurance that [Westbrook] had a site available and that he would be willing to rent the site." *Id.* McEwing stated that he then asked whether Westbrook had any objections to Family filing an application on the Mount Defiance site. *Id.* According to McEwing, Westbrook "expressed no objection, but said that he had a board meeting coming up soon, and that he would like a letter to present to the board." *Id.* McEwing also reported to the Commission that it was his belief following this conversation that the site owner did not object to Family specifying the site in its application, and that he would have to get a formal proposal to Westbrook to begin the negotiation process. *Id.*

5. The *HDO* recited that the question as to whether Family had reasonable assurance of the availability of a site depended on whose version of the telephone conversation one believes: under McEwing's account, "arguably there was more than a mere possibility that the site was available"; however, under Westbrook's account, "there was no meeting of the minds between the parties because Westbrook could consider only written proposals..." *Id.* at ¶ 9. Thus, the application was set for hearing to determine: (a) whether Family, at the time it so certified, had reasonable assurance that its proposed site would be available; and (b) whether it misrepresented to the Commission the availability of its specified site. *Id.* at ¶ 10.

6. After a trial-type hearing, the ALJ: (a) held that Family did not have the requisite reasonable assurance at the time it filed its application, *I.D.* at ¶¶ 27, 36; (b) resolved the site misrepresentation issue in Family's favor, concluding that McEwing did not possess an "intent to deceive the Commission as to the site's availability," a prerequisite for finding misrepresentation, *Id.* at ¶¶ 33-34, 36; and (c) denied Family's petition for leave to amend to a new site because:

The law is clear that 'an applicant will not be permitted to amend [to a new transmitter site] where it did not have the requisite reasonable assurance to begin with.... *Rem Malloy Broadcasting*, 6 FCC Rcd 5843 (Rev. Bd. 1991), citing *South Florida Broadcasting Co.*, 99 FCC 2d 840, 845 n.12 (Rev. Bd. 1984).

*Id.* at ¶ 35. No exceptions were filed to the ALJ's resolution of the misrepresentation issue.

### DISCUSSION

7. This case presents two decisional issues: (a) whether Family could rely on an ambiguous response from the agent of a site owner to establish that the site would be available; and (b) whether the ALJ erred in deciding that, because Family did not have reasonable assurance of a site when it first certified, it could not later amend to specify a new site.

8. The *HDO* set forth the controlling legal principles to establish reasonable assurance of site availability, which were followed by the ALJ in his legal conclusions. *HDO* at ¶ 8; *I.D.* at ¶¶ 26-31. In essence, there must be, "at a minimum, a meeting of the minds resulting in some firm understanding as to the availability of the site for the intended use. *Genesee Communications, Inc.*, 3 FCC Rcd 3595 (Rev. Bd. 1988)." "A subjective belief by the applicant does not meet the reasonable assurance standard. *Id.*" "The fact that a property owner has indicated that he will discuss the possibility of a lease at a future date does not, absent some indication that he is favorably disposed toward making such an arrangement, provide any more assurance than an unrejected offer. *El Camino Broadcasting Corp.*, 12 FCC 2d 25, 26 (Rev. Bd. 1968)." Finally, although a binding contract is not needed, "a mere possibility that the site will be available is not sufficient. *William F. Wallace and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974)." See also *Wine Country Radio*, FCC 95-481, released February 22, 1996.

9. Family does not challenge the applicable legal standard. On the contrary, the record establishes that its counsel had correctly instructed the applicant that:

Reasonable assurance means, at a minimum, permission to use the site. The permission may be given orally -- it need not be in writing -- but it must be unambiguously given.

*I.D.* at ¶ 9. Family does argue that the ALJ reached the wrong legal conclusion on the site issue because he "substantially warp[ed] the chronology of the conversation between McEwing and Westbrook." Family Brief at 5-8. It asserts that Westbrook's request for a "formal written proposal" came at the very outset of the discussion, and not at the end as indicated by the ALJ.

10. Our examination of the ALJ's findings, however, reveals that they accurately reflect McEwing's oral and written testimony and that Family has constructed its argument upon one conclusory paragraph taken out of context. *I.D.* at ¶¶ 8-10. On the essential point, the ALJ found that because McEwing was in a hurry to get the application on file (*id.* at ¶ 10) (parenthesis in original):

McEwing asked Westbrook if he (Westbrook) had any objections to Family filing an application on the Mt. Defiance site. [Citations omitted]. Westbrook replied ... that Family would need to send him a letter.' McEwing agreed to send the requested letter. [Citations omitted]. McEwing alleges that when the conversation with Westbrook ended, he [McEwing] believed that Westbrook would not object to Family

specifying the Mt. Defiance site in its application and that he had to prepare a formal written proposal for Westbrook to commence the negotiating process.

As to this latter point, the ALJ found pertinent the following McEwing response to questioning by Bureau counsel:

Q. Did you directly ask Mr. Westbrook whether Family had permission to use the Mt. Defiance site?

A. I asked Mr. Westbrook if he had any objection to us specifying the Mt. Defiance site in our application.

Q. And what did he tell you?

A. He said send me a letter.

Q. So he didn't say yes or he didn't say no, he just said send you -- send me a letter.

A. That's correct.

*I.D.* at ¶ 11 citing to Tr. 43-44. McEwing never sent Westbrook the requested written proposal. *I.D.* at ¶ 15.

11. In holding that Family did not have requisite reasonable site assurance at the time it filed its application, the ALJ concluded:

There was no ambiguity in Westbrook's response. Indeed the clear meaning of his response was underscored by Westbrook [less than two months after the telephone call] when Westbrook disabused Family of that idea by letter and also so informed the Commission."

*I.D.* at ¶ 27-28. Family disputes the ALJ's conclusion, arguing that Westbrook's response was "almost identical" to that of the station manager in *National Innovative Programming Network, Inc. of the East Coast*, 2 FCC Rcd 5641 (1987), where the Commission held that the applicant had reasonable assurance. Family Brief at 9.

12. We agree with the Bureau's Reply that *National* was significantly different:

In the *National* case, the station manager responded that he had no objection to the specification of his tower by the applicant, but that use of the tower was conditioned upon Commission approval of a new location for his station's tower. Unlike the facts in *National*, Westbrook did not state that he had no objection to Family's proposal. His response was, send me a letter, by which it was understood he was referring to a formal proposal. Thus, Westbrook's response was entirely different than the response in the *National* case and that case is inapposite.

Brief at 8. To the extent that Westbrook's response, as related by McEwing, indicated that "he had a board meeting coming up soon, and that he would like a letter to present to the board," Family's case more closely resembles *Progressive Communications, Inc.*, 3 FCC Rcd 5758 ¶¶ 1, 9-10 (Rev. Bd. 1988) (subsequent history omitted), where the applicant was also asked to write a letter and could not assume that it had received permission to use the site until it had received oral or written consent from the site owner. As in *Progressive*, Family did not have "a clear indication from the landowner" that its site was available for future

use. See *Wine Country Radio, supra*, citing *Elijah Broadcasting Corp.*, 5 FCC Rcd 5350, 5351 (1990), on which the ALJ also relied in denying Family's application. *I.D.* at ¶ 26. In sum, permission to use the site was not unambiguously given. We affirm the ALJ's resolution of this issue and turn to the question of whether Family should have been permitted to amend to a new site because of the ALJ's undisputed conclusion that Westbrook did not intend to deceive.

13. Family contends that the ALJ's finding that the applicant acted with "innocent intent" must be considered in determining whether an applicant lacking an initial reasonable assurance of its site may be permitted to amend to a new site." Family Brief at 10-17. It argues that this case is not controlled by *Rem Malloy, supra*, relied on by the ALJ, because Family "at worst, is the victim of honest mistake or misunderstanding." Brief at 12. We agree with the Bureau that the precedent cited by Family for support of its contention is of no avail.

14. Here, as in *Rem Malloy*, no meeting of the minds took place and McEwing's belief that he had permission to use the site, like the applicant in *Rem Malloy*, does not establish reasonable assurance. Moreover, *Rem Malloy* and the cases cited therein at ¶ 15 support the ALJ's holding that the Commission will not permit an applicant to amend to a new transmitter site if the applicant did not have reasonable assurance when it first certified. See also *Thomas W. Lawhorne*, 7 FCC Rcd 13, 15 ¶ 15 (Rev. Bd. 1992); *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 ¶ ¶ 11-13 (1991) (new financial proposal amendment not permitted where applicant lacked reasonable assurance of financing at the time of certification).

15. By contrast, *Georgia Public Telecommunications Commission*, 7 FCC Rcd 2942 (Rev. Bd. 1992), *rev. denied*, 7 FCC Rcd 7996 (1992), cited by Family, *see* Brief at 14-15, involved a narrow exception to the Commission's general rule that an amendment will be accepted only if the applicant had reasonable assurance at the time it certified its financial qualifications. Significantly, in affirming the Board, the Commission first cautioned that: "We have been increasingly stringent in enforcing this requirement, and it is with some trepidation that we depart from it here." 7 FCC Rcd at 7999. There, the applicant's sole voting shareholder had engaged in serious and reasonable efforts to insure the applicant's financial qualifications but nonetheless had been duped by an elaborate scheme for defrauding innocent investors. Here, as the Bureau aptly notes, "Family was not duped by individuals who had developed an elaborate scheme to deprive it of its antenna site." Reply at 11. Several other cases cited by Family were adequately distinguished in the Bureau's Reply at 11-12. In sum, unlike the applicant in *Georgia Telecommunications*, Family has not demonstrated extraordinary circumstances which might justify departure from a requirement the Commission has been "increasingly stringent in enforcing." We therefore affirm the ALJ's denial of site amendment.

16. ACCORDINGLY, IT IS ORDERED, That the application of Family Broadcasting, Inc. (File No. BPH-910924MB) for a construction permit for a new FM station to serve Hague, New York, IS DENIED

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino  
Chairman, Review Board